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No. 88-658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PANHANDLE EASTERN PIPE LINE COMPANY,

Petitioner,

v.

STATE OF ILLINOIS, ex rel. NEIL F. HARTIGAN, Attorney General of the State of Illinois,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

		PAGE
I.	*Illinois Brick* Neither Requires Nor Permits A Case-By-Case Factual Inquiry To Determine Whether The Reasons For The General Bar Exist	2
II.	Clear Conflicts Exist Among The Circuits	4
III.	Whether There Is A Total Pass-Through To Indirect Purchasers Is Immaterial	5
IV.	The Seventh Circuit's Decision Impermissibly Permits Suits By Both Direct And Indirect Purchasers	5
Conclusion		7

TABLE OF AUTHORITIES

Cases PAGE

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 2

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) .. *passim*

Jewish Hospital Association v. Stewart Mechanical Enterprises, Inc., 628 F.2d 971 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981) 4

In re Wyoming Tight Sands Antitrust Litigation, 1988-2 Trade Cas. (CCH) ¶ 68, 164 (D. Kan.), *appeal docketed*, Nos. 88-8042, 88-8043 (10th Cir. 1988) 4

Statutes

Section 4 of the Clayton Act, 15 U.S.C. § 15 ... 3

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REPLY BRIEF OF PETITIONER

Petitioner, Panhandle Eastern Pipe Line Company, submits this Reply Brief to show that this case merits the issuance of a Writ of Certiorari. There is a serious conflict between the Seventh Circuit's decision and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and serious conflicts among the circuits on the application of the *Illinois Brick* decision.[1]

[1] Respondent attempts to make a point by including the "corrected" *en banc* opinion, as reported in 852 F.2d 891 (7th Cir.

(Footnote continued on following page)

I. *Illinois Brick* Neither Requires Nor Permits A Case-By-Case Factual Inquiry To Determine Whether The Reasons For The General Bar Exist

Respondent is wrong in stating that Panhandle's position is that *Illinois Brick* "prohibits a factual analysis, especially from an economic perspective, as to whether a cost-plus contract exists." Resp. Br. 8-9. Panhandle's position is that *Illinois Brick* neither requires nor permits a factual analysis to determine in each case whether the underlying policy reasons for the general bar exist. Pet. 8-9. This Court rejected a request that the holding in *Hanover Shoe, Inc. v. United Machinery Corp.*, 392 U.S. 481 (1968), (and thus the holding in *Illinois Brick*) be limited to its "particular factual context." *Illinois Brick*, 431 U.S. at 729, 743-45

Moreover, respondent quotes *Illinois Brick* out of context by stating that the decision "necessitates a factual analysis to determine whether it is 'easy to prove that [the direct purchaser] has not been damaged;' or in other words 'that the overcharge has not been absorbed by the direct purchaser.' " Resp. Br. 9. That quotation from *Illinois Brick* simply explains why a limited exception for a preexisting, fixed quantity, cost-plus contract should be allowed. *Illinois Brick*, 431 U.S. at 732 n.12. It does not, as respondent suggests, authorize lower courts to reex-

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[1] *continued*

1988), in its appendix; Panhandle's appendix contains the *en banc* opinion the court served on the parties. Resp. Br. 1-2. However, respondent explains neither the nature nor the significance of the correction. In fact, the correction consists of substituting "industrial" for "residential" at R. App. 12 (line 5). This correction is without significance because the error is obvious; Panhandle recognized it as such, and did not rely upon it in its petition.

amine the facts on a case-by-case basis to determine whether the general bar should apply where no such contract exists.

Furthermore, contrary to respondent's argument, the Seventh Circuit *did* rely on "simplifying economic assumptions." Resp. Br. 9. It did so in positing—as the basis for discarding the fixed quantity requirement of the cost-plus exception—that "regulation must have succeeded in forcing [CILCO] to operate in a region of its demand curve where 100 percent passing on of any cost increase was the optimal strategy for the utility to follow." App. A-12.[2] This analysis is in direct contravention of *Illinois Brick*. *See* 431 U.S. at 742.

The general bar of *Illinois Brick* is based on this Court's construction of § 4 of the Clayton Act, 15 U.S.C. § 15, that the direct purchaser is the "person injured" and is injured by the full amount of the overcharge. The Seventh Circuit invaded the province of this Court and of Congress by reexamining the reasons for the Court's settled construction of § 4.

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[2] Apparently this Court's rejection of elasticity studies in *Illinois Brick*, 431 U.S. at 742, persuaded Judge Posner to omit from his opinion for the court *en banc* the explicit references to demand elasticity contained in his dissent to the panel's opinion. Nevertheless, the analysis in both opinions employs this concept.

Moreover, simplifying assumptions as to elasticity cannot be made. For example, respondent states that gas sales to residentials increased 13% in 1984. Resp. Br. 5. However, respondent fails to state that in 1984, Panhandle had reduced its prices from those in 1983. DX 1404-1. In 1983, when Panhandles gas prices increased significantly over previous years, CILCO's gas sales decreased 13 percent overall and 20 percent as to residentials. Appendix of Panhandle to the Seventh Circuit, pp. 301, 314, filed Oct. 28, 1985.

II. Clear Conflicts Exist Among The Circuits

Contrary to respondent's statement, Panhandle did not "mislead this Court" in stating that the Seventh Circuit conceded the conflict. Resp. Br. 11-12. The Seventh Circuit clearly acknowledged a conflict when it characterized the decisions of the panel and of the Third, Eighth, and Ninth Circuits as having read the cost-plus exception "narrowly" to require a preexisting fixed quantity provision, and then proceeded to redefine it expansively as not requiring such a provision. App. A-3.

The Seventh Circuit's statement that the court had before it a "stand-in for the quantity requirement in an ordinary contract" is a further acknowledgement that a conflict exists with such circuits as the Second, Third and Fourth, which have required an *actual* fixed quantity provision.[3] Resp. Br. 12.

Respondent's argument that Panhandle has raised for the first time the "pre-existence requirement" is false. Resp. Br. 12-13. Panhandle cited *Jewish Hospital Association v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981), to

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[3] Respondent correctly recognizes that the Seventh Circuit's decision conflicts with *In re Wyoming Tight Sands Antitrust Litigation*, 1988-2 Trade Cas. (CCH) ¶ 68,164 (D. Kan.), *appeal docketed*, Nos. 88-8042, 88-8043 (10th Cir. 1988), but is wrong in stating that the *Tight Sands* court relied on the panel decision. Resp. Br. 11 n.6. That court independently, by its own analysis, concluded that *Illinois Brick* and *Hanover Shoe* barred indirect purchaser damage claims in that case. "The opposing parties' arguments have failed to convince this court of the inapplicability of *Hanover Shoe* and *Illinois Brick*." *Id.* at 59,099-100. The court merely recognized that its decision was consistent with the panel decision. "This court agrees with the analysis and decision in *Panhandle Eastern*." *Id.* at 59,100.

the Seventh Circuit in arguing the need for a *preexisting*, fixed quantity contract between the direct and indirect purchasers. Brief of Panhandle to the Seventh Circuit, p. 30, filed Oct. 28, 1985.

III. Whether There Is A Total Pass-Through To Indirect Purchasers Is Immaterial

Respondent's reliance upon its claim that the entire alleged overcharge was passed on to CILCO's "residential" customers is misplaced. Resp. Br. 6, 8, 9. The amount of overcharge passed on is wholly irrelevant to application of the indirect purchaser bar or the pass-on defense.[4] This Court in *Illinois Brick* recognized that the rule may deny recovery to indirect purchasers who are in fact injured by an antitrust violation, but determined that the reasons in favor of the rule outweigh this concern. *Illinois Brick*, 431 U.S. at 746.

IV. The Seventh Circuit's Decision Impermissibly Permits Suits By Both Direct And Indirect Purchasers

Respondent's attempt to rationalize the coexistence of suits by both the direct and indirect purchasers is misplaced. Resp. Br. 9-10. No amount of rationalization can overcome this Court's articulation that only one suit is

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[4] Respondent's assertion that a utility (such as CILCO) under the PGA provision passes through "100 percent of its cost of gas; an LDC may not absorb one cent of its cost of gas sold" is a mischaracterization of a utility's rate mechanism. Resp. Br. 4. Even the Seventh Circuit did not accept this argument, but recognized that CILCO can and did absorb gas costs by lowering the other components of its rates, the PGA notwithstanding. App. A-13. As the Seventh Circuit also recognized, gas costs also can be absorbed by foregoing rate increases. App. A-14.

permitted—either by the direct purchaser under the rule of *Illinois Brick* or the indirect purchaser under the cost-plus exception to the rule. The Seventh Circuit decision stands alone. No other decision since *Illinois Brick* has allowed suits by both the direct and indirect purchasers to proceed. Moreover, in allowing the claims of the residential customers but disallowing the claims of the industrial customers, the Seventh Circuit had to classify customers, which is contrary to *Illinois Brick*. 431 U.S. at 744-45.

Respondent necessarily concedes that the Seventh Circuit's decision permits both suits, but argues that this does not present any problems of duplicative recovery. Resp. Br. 9-10. Respondent makes this argument despite the fact that CILCO seeks to recover the *same* alleged overcharge as does respondent on sales to the indirect purchasers. Respondent's suggestion that Panhandle "will be able to successfully assert a *Hanover Shoe* pass-on defense against CILCO" is self-serving, wholly gratuitous and of no legal significance. Resp. Br. 10. However, by merely having to make that suggestion respondent acknowledges that the prospect of duplicative damages is real.

CONCLUSION

For the reasons stated in the Reply Brief, and in the Petition for Certiorari, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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